SUPREME COURT OF THE UNITED STATES.

No. 248.

THE SHIP BIRD OF PARADISE, HER TACKLE, APPAREL, AND CARGO, TAYLOR & CO., CLAIMANTS, APPELLANTS,

vs.

LEONARD HEYNEMAN, HERMAN HEYNEMAN, AND FREDERICK P. SOLOMON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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1 *Libel.*

In the district court of the United States for the northern district of California, in admiralty.

LEONARD HEYNEMAN, HERMAN HEYNEMAN, AND Frederick P. Solomons
vs.
THE SHIP BIRD OF PARADISE, HER TACKLE, APPAREL, &c., AND CARGO.

To the Honorable Ogden Hoffman, judge of the district court of the United States for the northern district of California:

The libel of Leonard Heyneman, Herman Heyneman, and Frederick P. Solomons, against the ship Bird of Paradise, her tackle, apparel, and furniture, and the cargo laden on board thereof, and all persons lawfully intervening for their interest in the said ship, in a cause of contract, civil and maritime, alleges as follows:

First. On the 16th day of March, A. D. 1863, Messrs. A. Taylor & Co., owners of the said vessel, the Bird of Paradise, of 678 tons or thereabouts, then lying in the harbor of Liverpool, England, by charter-party
2 chartered the said vessel unto Anthony Eccles for a voyage from Liverpool aforesaid to San Francisco, a copy of which charter-party is hereunto annexed, marked Exhibit A, and the same is made a part of this libel.

Second. That in accordance with the said charter-party the said Eccles shipped upon said vessel a full and complete cargo of coals or fuel, not exceeding what she could reasonably stow or carry over and above her tackle, apparel, provisions, and furniture, that is to say, 952 tons of coal, at and before the 4th day of April, 1863, and then and there received a bill of lading therefore, signed and duly delivered by R. Davidson, the then master of the said ship, a copy of which, with the endorsements thereon subsequently made, is hereto annexed and marked Exhibit B, and is made a part of this libel.

Third. That the said charterer paid in cash, prior to the sailing of the said vessel, one fourth of the freight, as provided in the said charter-party, and also one fourth by charterer's acceptance at six months from the
3 final sailing of the vessel from her last port in the United Kingdom.

Fourth. That the charterer has well and duly performed and kept all the covenants and undertakings on his part to the said charter-party to be performed and kept, but neither the said master, owners, nor the said vessel have well and truly performed and kept the covenants and undertakings on the part of the said owners, master, and vessel, according the said charter-party to be performed and kept.

Fifth. That after completing her lading as aforesaid the said ship proceeded on her voyage to San Francisco, at which port she safely arrived on the 27th day of December, A. D. 1863.

Sixth. That Messrs. Leech, Harrison & Forward, of Liverpool, advanced and loaned to the said Anthony Eccles a large amount of money upon the security of the said charter-party, and for and in consideration thereof the said Anthony Eccles assigned and transferred the said charter-party and bill of lading, and all his rights under the same and in said cargo to
4 the said Leech, Harrison & Forward, who assigned the same to the libellants, and appointed Heyneman & Co., of San Francisco, charterer's agents to receive the consignment of the said vessel, and to receive her said cargo; but although the said vessel safely arrived as aforesaid with her cargo, yet the said master thereof would not and did not consign or ad-

dress the said vessel to the said charterer's agents at San Francisco, but on the arrival of the said ship entered the same at the custom-house as consigned to order, nor did the said master, nor would he deliver the said cargo to the libellants, but though often demanded he has refused, and still does refuse, to deliver the same to libellants in accordance with the terms of the said charter-party. And particularly the libellant alleges that on the 15th day of January, A. D. 1864, these libellants having paid and satisfied the duties at the custom-house, and having obtained proper authority therefrom for the delivery of the said cargo, and the vessel being at the wharf and prepared to discharge cargo, with men and means at hand for that
5 purpose, the libellants appointed and placed there a proper person to receive said cargo from the said vessel, and were ready and willing to receive the said cargo in accordance with the terms of the charter-party, and demanded of the said master that he should deliver the said cargo to the libellants, but the said master refused to do so, and did not and would not deliver said cargo, but did deliver eight tons thereof and no more; and now the said master of the said vessel claims the right to hold the said cargo, and does hold the same, and refuses to deliver the same, unlawfully and without right claiming to have and hold a lien upon the said cargo for the freight thereof, whereas he has in fact no lien upon the said cargo, but by the very terms of the contract of charter has discharged and dispensed with the said lien, so that it never in fact existed, and his withholding of the said cargo is wrongful and unlawful, and these libellants have suffered damage from such refusal, and the other breaches of the contract hereinbefore set forth, to fifty thousand dollars.

6 Wherefore your libellants pray that process in due form of law may issue against the said vessel, her tackle, apparel, and furniture, and the said cargo, and that all persons having or claiming any interest in the same may be required to appear before this honorable court and show cause why possession of the said cargo should not be delivered to your libellants as having good title thereto, and why the said vessel, her tackle, apparel, and furniture should not be condemned and sold, and the damages suffered by your libellants satisfied out of the proceeds and the costs of this suit, and that the libellants may have such other or further relief in the premises as in law and justice they may be entitled to.

HERMANN HEYNEMAN.

B. S. BROOKS, *P'r and Adv. for Libellants.*

Sworn to and subscribed before me this 19th day of January, A. D. 1864.

W. H. CHEVERS, *U. S. Com'r.*

7 EXHIBIT A,

Referred to in foregoing complaint and made a part thereof.

Langley, Cooper & Co, ship-brokers, Liverpool.

The captain is to apply for cargo. The one fourth advance that is paid in cash is subject to three months' interest at 5 per cent per annum, as well as cost of insurance.

LIVERPOOL, 16 *March*, 1863.

CHARTER-PARTY.—It is this day mutually agreed between Messrs. A. Taylor & Co., owner of the good ship or vessal called the Bird of Paradise, of 678 tons, or thereabouts, now in the port of Liverpool, whereof is master, and Anthony Eccles, esq'r, of Liverpool, merchant; that the said ship being tight, staunch, strong, and in every way fitted for the voyage, shall,

with all possible dispatch, proceed to the Liverpool side, and there load in the usual and customary manner in 14 days in any dock-freighter; may name a full and complete cargo of coal or fuel at charterer's option, which said freighter binds himself to ship not exceeding what she can reason-
8 ably stow or carry over and above her tackle, apparel, provisions, and furniture, and charterer to name stevedore, ship paying 9*d* per ton; and being so loaded shall therewith proceed to San Francisco, or so near thereunto as she may safely get, and deliver the same alongside any craft, steamer, floating depot, or pier, where she can lie afloat; notice to be given to the agents of the vessel being ready to discharge, (the act of God, the queen's enemies, fire, strike of pitmen, frost, and all and every other dangers and accidents of the seas, rivers, and navigation during the said voyage, always mutually excepted.) The freight to be paid in Liverpool on unloading and right delivery of the cargo, at and after the rate of 53 shillings and six pence sterling per ton of 20 cwt. on the quantity delivered, in full of all port charges, pilotages, dock wharfage, harbor dues, and Dover and Ramsgate dues as customary; and such freight is to be paid, say, one fourth in cash, and one fourth by charterer's acceptance at six months from the final
9 sailing of the vessel from her last port in the United Kingdom, freighter to insure the amount and deduct the cost of so doing from the first payment of the freight, and the remainder by like bill at three months from date of delivery at charterer's office, in Liverpool, of the certificate of the right delivery of the cargo, agreeably to bills of lading, or in cash, under discount, at 5 per cent. per annum, at freighter's option; the cargo to be discharged at the rate of not less than 45 tons a working day, or to pay demurrage at the rate of four per ton register O. M. per diem. The vessel to be addressed to the freighter's agent abroad, free of commission, paying 5 per cent to charterer in Liverpool.

A commission of five per cent. on this contract is due to Langley, Cooper & Co., ship lost or not lost. If the cargo be full it is to be discharged by hand, or in baskets, to prevent unnecessary breakage. £500 to be advanced
10 in cash at port of discharge, on account of this freight, upon customary terms against captain's draft on charterer at ninety days' sight. The ship and her freight are bound to this venture. The penalty for non-performance of this agreement is to be the chartered freight in pounds sterling.

(S'g'd) A. TAYLOR,
A. ECCLES.

Witness to the signature of A. Taylor & Co:
(S'g'd) W. A. COOPER.
Witness to the signature of A. Eccles:
(S'g'd) T. E. EDWARDS.

EXHIBIT B,

Referred to in the foregoing complaint, and made part thereof.

Shipped, in good order and condition, by Anthony Eccles, in and good ship or vessel called the Bird of Paradise, whereof is master for this present voyage, and now lying in the port of Liverpool, and bound
11 for San Francisco, nine hundred and fifty-two tons of best steam coals, being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port of San Fran-
952 tons of coal. cisco, (all and every the damages and accidents of the seas and navigation of whatsoever nature or kind excepted,) unto order, or to assigns, he or they paying freight for said goods at the rate of as per charter-party.

dress the said vessel to the said charterer's agents at San Francisco, but on the arrival of the said ship entered the same at the custom-house as consigned to order, nor did the said master, nor would he deliver the said cargo to the libellants, but though often demanded he has refused, and still does refuse, to deliver the same to libellants in accordance with the terms of the said charter-party. And particularly the libellant alleges that on the 15th day of January, A. D. 1864, these libellants having paid and satisfied the duties at the custom-house, and having obtained proper authority therefrom for the delivery of the said cargo, and the vessel being at the wharf and prepared to discharge cargo, with men and means at hand for that
5 purpose, the libellants appointed and placed there a proper person to receive said cargo from the said vessel, and were ready and willing to receive the said cargo in accordance with the terms of the charter-party, and demanded of the said master that he should deliver the said cargo to the libellants, but the said master refused to do so, and did not and would not deliver said cargo, but did deliver eight tons thereof and no more; and now the said master of the said vessel claims the right to hold the said cargo, and does hold the same, and refuses to deliver the same, unlawfully and without right claiming to have and hold a lien upon the said cargo for the freight thereof, whereas he has in fact no lien upon the said cargo, but by the very terms of the contract of charter has discharged and dispensed with the said lien, so that it never in fact existed, and his withholding of the said cargo is wrongful and unlawful, and these libellants have suffered damage from such refusal, and the other breaches of the contract hereinbefore set forth, to fifty thousand dollars.

6 Wherefore your libellants pray that process in due form of law may issue against the said vessel, her tackle, apparel, and furniture, and the said cargo, and that all persons having or claiming any interest in the same may be required to appear before this honorable court and show cause why possession of the said cargo should not be delivered to your libellants as having good title thereto, and why the said vessel, her tackle, apparel, and furniture should not be condemned and sold, and the damages suffered by your libellants satisfied out of the proceeds and the costs of this suit, and that the libellants may have such other or further relief in the premises as in law and justice they may be entitled to.

HERMANN HEYNEMAN.

B. S. BROOKS, *P'r and Adv. for Libellants.*

Sworn to and subscribed before me this 19th day of January, A. D. 1864.

W. H. CHEVERS, *U. S. Com'r.*

7 EXHIBIT A,

Referred to in foregoing complaint and made a part thereof.

Langley, Cooper & Co, ship-brokers, Liverpool.

The captain is to apply for cargo. The one fourth advance that is paid in cash is subject to three months' interest at 5 per cent. per annum, as well as cost of insurance.

LIVERPOOL, 16 *March*, 1863.

CHARTER-PARTY.—It is this day mutually agreed between Messrs. A. Taylor & Co., owner of the good ship or vessal called the Bird of Paradise, of 678 tons, or thereabouts, now in the port of Liverpool, whereof is master, and Anthony Eccles, esq'r, of Liverpool, merchant; that the said ship being tight, staunch, strong, and in every way fitted for the voyage, shall,

with all possible dispatch, proceed to the Liverpool side, and there load in the usual and customary manner in 14 days in any dock-freighter; may name a full and complete cargo of coal or fuel at charterer's option, which said freighter binds himself to ship not exceeding what she can reason-
8 ably stow or carry over and above her tackle, apparel, provisions, and furniture, and charterer to name stevedore, ship paying 9*d* per ton; and being so loaded shall therewith proceed to San Francisco, or so near thereunto as she may safely get, and deliver the same alongside any craft, steamer, floating depot, or pier, where she can lie afloat; notice to be given to the agents of the vessel being ready to discharge, (the act of God, the queen's enemies, fire, strike of pitmen, frost, and all and every other dangers and accidents of the seas, rivers, and navigation during the said voyage, always mutually excepted.) The freight to be paid in Liverpool on unloading and right delivery of the cargo, at and after the rate of 53 shillings and six pence sterling per ton of 20 cwt. on the quantity delivered, in full of all port charges, pilotages, dock wharfage, harbor dues, and Dover and Ramsgate dues as customary; and such freight is to be paid, say, one fourth in cash, and one fourth by charterer's acceptance at six months from the final
9 sailing of the vessel from her last port in the United Kingdom, freighter to insure the amount and deduct the cost of so doing from the first payment of the freight, and the remainder by like bill at three months from date of delivery at charterer's office, in Liverpool, of the certificate of the right delivery of the cargo, agreeably to bills of lading, or in cash, under discount, at 5 per cent. per annum, at freighter's option; the cargo to be discharged at the rate of not less than 45 tons a working day, or to pay demurrage at the rate of four per ton register O. M. per diem. The vessel to be addressed to the freighter's agent abroad, free of commission, paying 5 per cent to charterer in Liverpool.

A commission of five per cent. on this contract is due to Langley, Cooper & Co., ship lost or not lost. If the cargo be full it is to be discharged by hand, or in baskets, to prevent unnecessary breakage. £500 to be advanced
10 in cash at port of discharge, on account of this freight, upon customary terms against captain's draft on charterer at ninety days' sight. The ship and her freight are bound to this venture. The penalty for non-performance of this agreement is to be the chartered freight in pounds sterling.

(S'g'd) A. TAYLOR,
A. ECCLES.

Witness to the signature of A. Taylor & Co:
(S'g'd) W. A. COOPER.
Witness to the signature of A. Eccles:
(S'g'd) T. E. EDWARDS.

EXHIBIT B,

Referred to in the foregoing complaint, and made part thereof.

Libel

Shipped, in good order and condition, by Anthony Eccles, in and upon the good ship or vessel called the Bird of Paradise, whereof is master for this present voyage, and now lying in the port of Liverpool, and bound
11 for San Francisco, nine hundred and fifty-two tons of best steam coals, being marked and numbered as per margin, and are to be delivered in
952 tons of coal. the like good order and condition at the aforesaid port of San Francisco, (all and every the damages and accidents of the seas and navigation of whatsoever nature or kind excepted,) unto order, or to assigns, he or they paying freight for said goods at the rate of as per charter-party.

In witness whereof, the master of the said ship or vessel hath affirmed to these bills of lading, all of this tenor and date, one of which being accomplished the rest to stand void.

Dated in Liverpool this 4 day of April, 1863.

Weight and quantity unknown.

R. DAVIDSON.

Endorsed: Filed January 19, 1864.

W. H. CHEVERS, *Clerk.*

12 *Libellants' stipulation for costs.*

UNITED STATES OF AMERICA:

District court of the United States for the northern district of California.

Whereas a libel was filed in this court on the 19th day of January, in the year of our Lord one thousand eight hundred and sixty four, by L. Heyneman *et al.*, against the ship Bird of Paradise for reasons and causes in the said libel mentioned, and the said Herman Heyneman and Gustavus Ris and Henry Reese, his sureties, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the said libellant or his sureties, execution may issue against their goods, chattels, and lands for the sum of five hundred dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the undersigned shall be, and each of them is, bound in the sum of five hundred dollars, conditioned the libellants above named shall pay all costs and charges that may be awarded against them in any
13 decree by this court, or in case of appeal by the appellate court.

H. HEYNEMAN.
G. RIS.
HENRY REESE.

Taken and acknowledged this 19th day of Jan'y, 1864, before me.

W. H. CHEVERS, *U. S. Commissioner.*

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

Gustavis Ris and Henry Reese, parties to the above stipulation, being duly sworn, do depose and say, each for himself, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

G. RIS.
HENRY REESE.

Sworn to this 19th day of Jan'y, 1864, before me.

W. H. CHEVERS, *United States Commissioner.*

Endorsed: Filed January 19, 1864.

W. H. CHEVERS, *Clerk.*

14 *Claim.*

In the district court of the United States in and for the northern district of California.

L. HEYNEMANN *et al*, libellants,
v.
SHIP BIRD OF PARADISE, defendant.

To the Hon. Ogden Hoffman, judge of the district court of the United States in and for the northern district of California:

A. Taylor & Co., of Liverpool, England, owners of the ship Bird of Paradise, her tackle, apparel, and furniture, intervening for their interest in the

said ship Bird of Paradise, her tackle, apparel, and furniture and cargo, appear before this hon. court and claim the said ship, her tackle, apparel, and furniture, and cargo, and state that they are the true and bona fide owners of said ship, her tackle, &c., and that no other person is the owner thereof, and that they are in possession of said cargo, and hold the same for the payment of freight due thereon.

And thereupon the said claimants pray that this honorable court
15 will be pleased to decree a restitution of the same to them, and otherwise right and justice to administer in the premises.

Dated San Francisco, Feb. 2d, 1864.

A. TAYLOR & CO.,
By their agent, RICHARD DAVIDSON.

H. & C. McALLISTER, *Proctors for Claimants.*

NORTHERN DISTRICT OF CALIFORNA,
City and County of San Francisco, ss:

Richard Davidson, being duly sworn, deposes and says that he is master of the ship Bird of Paradise, and is agent of the claimants herein, and as such agent is authorized by said claimant to file and verify this claim; deponent further says that he has read the foregoing claim, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

16 RICHARD DAVIDSON.

Sworn to before me this 2d Feb'y, A. D. 1864.
W. H. CHEVERS, *U. S. Com.*

Endorsed: Filed Feb'y 2, 1864.
W. H. CHEVERS, *Clerk.*

17 *Claimants' stipulation for costs.*

UNITED STATES OF AMERICA:

District court of the United States for the northern district of California.

Whereas a libel was filed in this court on the 19th day of January, in the year of our Lord one thousand eight hundred and sixty-four, by L. Heyneman *et al.*, against the ship Bird of Paradise and cargo, for reasons and causes in the said libel mentioned; and whereas Richard Davidson has this day filed a claim herein as agent of the owners of the ship Bird of Paradise and cargo, and the said Richard Davidson, and Albert Dibblee and C. J. Dempster, his sureties, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the said claimants or his sureties, execution may issue against their goods, chattels, and lands of the sum of five hundred dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the undersigned shall be, and each of them is, bound in the sum of five hundred dollars, conditioned the claimants above-named
18 shall pay all costs and charges that may be awarded against them in any decree by this court, or in case of appeal by the appellate court.

RICHARD DAVIDSON.
ALBERT DIBBLEE.
C. J. DEMPSTER.

Taken and acknowledged this second day of February, 1864, before me.
W. H. CHEVERS, *United States Commissioner.*

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

Albert Dibblee and C. J. Dempster, parties to the above stipulation, being duly sworn, do depose and say, each for himself, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

ALBERT DIBBLEE.
C. J. DEMPSTER.

Sworn to this second day of February, 1864, before me.

W. H. CHEVERS, *United States Commissioner.*

19 Endorsed: Filed February 2d, 1864.

W. H. CHEVERS, *Clerk.*

Monition.

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

The President of the United States of America to the marshal of the United States for the northern district of California, greeting:

Whereas a libel hath been filed in the district court of the United States for the northern district of California, on the 19th day of January, in the year of our Lord one thousand eight hundred and sixty-four, by L. Heynemann *et al.*, against the ship Bird of Paradise, her tackle, apparel, and furniture, and the cargo laden on board thereof, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to me made, and that all persons interested in
20 the said ship or vessel, her tackle, &c., may be cited in general and special to answer the premises, and all proceedings being had that the said ship or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore hereby commanded to attach the said ship or vessel, her tackle, &c., and the cargo laden on board thereof, and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the northern district of California, on the 2d day of February next, at eleven o'clock in the forenoon of the same day, if the same day shall be a day of jurisdiction, otherwise, on the next day of juris-
21 diction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the Ogden Hoffman, judge of said court, at the city of San Francisco, in the northern district of California, this 19th day of January, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-eighth.

W. H. CHEVERS, *Clerk.*

B. S. BROOKS, *Proctor for Libellants.*

In obedience to the within monition, I attached the vessel and cargo therein described, on the 19th day January, 1864, and have given due notice to all persons claiming the same, that this court will on the 2d day of February, 1854, (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter,) proceed to the trial and condemnation thereof,
22 should no claim be interposed for the same.

CHARLES W. RAND, *U. S. Marshall,*
By M. R. GRANT, *Deputy.*

Dated Jan. 19th, 1864.

Endorsed: Filed Feb'y 2d, 1864. **W. H. CHEVERS, *Clerk.***

23 *Exceptions to libel.*

In the district court of the United States in and for the northern district of California.

LEONARD HEYNEMANN, HERMANN HEYNEMANN, AND Frederick P. Solomons, libellants,
vs.
THE SHIP BIRD OF PARADISE, HER TACKLE, APPAREL, AND furniture, defendant.

To the Honorable Ogden Hoffman, judge of the district court of the United States in and for the northern district of California:

The exceptions of Messr. Taylor & Co., claimants in above-entitled action, to the libel of above-named libellants allege that the said libel is informal and insufficient, as follows:

First exception. That the sixth article of said libel is ambiguous and without plain and precise allegations upon which issue can be taken, in this, that it fails to show the amount of the alleged loan and advance
24 charged to have been made by Messrs. Leach, Harrison & Forward to the alleged charterer, Anthony Eccles, that it fails to show the terms and conditions of said alleged loan and advance, that it fails to show that said alleged loan and advance was at the date of the arrival of said Bird of Paradise, at the port of San Francisco, or at the commencement of this action, still subsisting and unpaid, and that said sixth article is otherwise informal and insufficient.

Second exception. That Exhibit B, annexed to said libel purports to be a copy of the bill of lading alleged to have been transferred by said Anthony Eccles to said Leach, Harrison & Forward, and by them to libellants, but that Exhibit B shows no endorsement thereof by said Anthony Eccles, thus contradicting the allegations as to said transfers set forth in the sixth article of said libel.

H. & C. McALLISTER, *Proctors for Claimants.*

Endorsed: Filed Feb'y 20th, 1864.

W. H. CHEVERS, *Clerk.*

25 *Order on exceptions to libel, denying mo. to sell cargo, and allowing 5 days to ans.*

At a stated term of the district court of the United States of America for the northern district of California, held at court-room, in the city of San Francisco, on Wednesday, the ninth day of March, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The Honorable Ogden Hoffman, district judge.

L. HEYNEMANN *et al.*
vs.
SHIP BIRD OF PARADISE.

Upon reading and filing notice of motion and affidavit, and having heard Mr. McAllister for claimants in favor of said motion, and Mr. Brooks for the libellants opposing, on motion of Brooks & Whitney, proctors for libellants, the motion of the claimants to sell the cargo of said ship as perishable is hereby denied.

And said cause coming on to be heard upon exceptions to the libel, and Mr. McAllister having been heard on behalf of claimants, in support
26 of said exceptions, and Mr. Brooks for libellants in opposition, on motion of Brooks & Whitney, proctors for libellants, it is ordered that the first exception be, and the same hereby is, overruled, that the second ex-

ception is sustained with leave to amend in respect thereto, and the libel is amended by adding to it copy of the bill of lading annexed to the libel, the endorsement thereof, and that the claimants have five days from this time to answer.

Endorsed: Filed March 9th, 1864.

W. H. CHEVERS, *Clerk.*

27 *Amendments to libel.*

In the district court of the United States, northern district of California, in admiralty.

LEONARD HEYNEMAN
vs.
THE SHIP BIRD OF PARADISE, &c.

Amendments to the libel now on file in this cause:

1. On page 2, line 10, after the words "copy of which" insert the words "with the endorsements thereon subsequently made."

2. At the end of Exhibit B, annexed to said libel, add, endorsed: "I hereby certify that the within mentioned double-screened Little Delph coals is of the best description for steam wrought from the Lancashire Mines.

ANTHONY ECCLES.
ANTHONY ECCLES."

BROOKS & WHITING, *Proctors for Libellants.*

Endorsed: Filed March 9th, 1864.

W. H. CHEVERS, *Clerk.*

28 *Answer.*

In the district court of the United States for the northern district of California.

LEONARD HEYNEMANN, HERMAN HEYNEMANN, AND Frederick P. Solomons, libellants,
vs.
THE SHIP BIRD OF PARADISE, HER TACKLE, APPAREL, and cargo.

To the Honorable Ogden Hoffman, judge of the district court of the United States in and for the northern district of California:

The answer of Taylor & Co., claimants in above-entitled action, to the libel of Leonard Heynemann, Herman Heynemann, and Frank P. Solomons alleges as follows:

First. That they admit the truth of the allegations of the first article of said libel.

Second. That they admit the truth of the allegations of the second article of said libel.

Third. They admit that the charterer, Anthony Eccles, paid in cash
29 prior to the sailing of said Bird of Paradise, one fourth of the freight as provided in the charter-party, copy of which is annexed to the libel and marked, Exhibit A, and also gave to claimants his acceptance at six months from the final sailing of the said vessel from her last port in the United Kingdom, for one fourth part of the freight stipulated for in said charter-party.

That said Bird of Paradise sailed from her last port in the United Kingdom on said voyage on the 16th day of April, A. D. 1863.

That said acceptance fell due on the 19th of October, A. D. 1863, but was not paid, and has ever since remained, and still is, due and unpaid.

Fourth. These claimants deny that the said charterer has well or truly performed or kept the covenants or undertakings of said charter-party, on his part to be performed and kept, for that the said Anthony Eccles neglected to pay his acceptance (mentioned in the third article of said libel) for one fourth part of the freight stipulated in said charter-party
30 when the same fell due, and that since the 19th day of October. A. D. 1863, said acceptance has remained, and was at the time of the arrival of said vessel at said San Francisco, and still is, due and unpaid, and that these claimants are, and ever since the execution of said acceptance have been, the owners and holders of the same. That after the making of said charter party, and previous to the arrival of said Bird of Paradise at the port of San Francisco, said Anthony Eccles failed in business and became, and still is, insolvent and bankrupt, and, as these claimants are informed and believe, absconded from England. And these claimants deny that they or the master of said ship, or said vessel, have not well and truly performed and kept the covenants and undertakings on the part of themselves, of said master and of said vessel to be performed and kept according to said charter-party.

Fifth. They admit the truth of the allegations of the fifth article of
31 said libel.

Sixth. That as to any advance or loan made by Messrs. Leach, Harrison & Forward, of Liverpool, to said Anthony Eccles, upon the security of said charter-party, or otherwise, these claimants have no knowledge, and therefore deny the same, and hold the libellants to strict proof thereof. That as to any assignment or transfer by said Anthony Eccles, of said charter-party, or of the bill of lading, (copy of which is annexed to the libel, and marked Exhibit B,) or of his rights under the same, or of his rights in said cargo, to said Leach, Harrison & Forward, these claimants have no knowledge, and therefore deny the same, and hold the libellants to strict proof. That as to any assignment or transfer by said Leach, Harrison & Forward of said charter-party, or said bill of lading, or of their rights thereunder, or of their rights in said cargo, to libellants, these claimants
32 have no knowledge, and therefore deny the same, and hold the libellants to strict proof thereof. That as to any appointment of Heynemann & Co., of San Francisco, as charterer's agents to receive the consignment of said vessel, or to receive her said cargo, these claimants have no knowledge, and therefore deny the same, and hold the libellants to strict proof thereof. These claimants deny that they, or the master of said vessel, have refused, or do still so refuse, to deliver said vessel and cargo to libellants in accordance with the terms of said charter-party. That as to the payment or satisfaction of the duties at the custom-house, or as to the obtainment therefrom of proper authority for the delivery of said cargo, as alleged in said libel, these claimants have no knowledge, and therefore deny the same, and hold the libellants to strict proof thereof. These claimants aver that libellants, although often requested so to do, did not, at any time previous
33 to the commencement of this action, exhibit proper sufficient authority to these claimants, or to the master of said vessel, or to any agent of said claimants, of the assignment or transfer to libellants of said charter-party, or of the bill of lading of said cargo, or of the appointment of Heyneman & Co. as consignees of said vessel or of said cargo. These claimants deny that they or the master of said vessel unlawfully, or without right, claim to have and hold a lien upon said cargo for the freight thereof, and deny that they have, in fact, no lien upon said cargo. These claimants deny that the withholding of said cargo by them, or by the master of said vessel, is wrongful or unlawful, and deny that libellants have suffered damage from any conduct of theirs, or of said master, or from any breaches of contract,

as alleged in said libel, in the sum of fifty thousand dollars, or in any other sum whatever.

34 Seventh. These claimants aver that the whole conduct of said Anthony Eccles in the making, and in the inducing these claimants to make said charter-party, was a fraudulent contrivance on his part to incorporate into the value of said cargo the large freight thereof between Liverpool, England, and San Francisco, California, with the intention on his part of defrauding claimants of the amount of such freight. That at the time said Anthony Eccles negotiated for and entered into said charter-party he was, and well knew that he was, insolvent, and never intended to pay the freight of said cargo stipulated for in said charter-party. That said Anthony Eccles, at and about the same time he made the said charter-party of said Bird of Paradise, entered into similar charter-parties of several other vessels for cargoes of coal, to wit, the Enoch Train, the , all of which

35 said charter-parties contained stipulations, which the said Eccles considered were, and which were intended by him to be, sufficient to waive the ship-owner's liens for the freight of said cargoes, and all of which were devised and executed by the said Eccles when he was insolvent, and when he well knew that he was insolvent, and with the fraudulent design on his part of never paying the freight on said several cargoes of coal. And these claimants aver that before the arrival of said Bird of Paradise at San Francisco, said Eccles publicly failed in business and became a bankrupt, and these claimants have been informed, and believe, absconded from England.

Wherefore, these claimants pray that this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn the libellants in costs, and otherwise law and justice to administer in the premises.

H. & C. McALLISTER, *Proctors for Claimants.*

36 NORTHERN DISTRICT OF CALIFORNIA, *ss:*

Richard Davidson, of aforesaid district, being sworn, says that he is the master of said vessel, the Bird of Paradise, and the agent of the claimants herein for the defence of this action; that said claimants reside in Liverpool, England, and are not now within the State of California; that the above answer is true, according to the best of deponent's knowledge and belief.

RICHARD DAVIDSON.

Subscribed and sworn to before me this 21st day of March, A. D. 1864.

W. H. CHEVERS, *U. S. Com'r.*

Endorsed: Filed March 21st, 1864.

W. H. CHEVERS, *Clerk.*

37 *Order releasing cargo and filing stipulation.*

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Monday, the 28th day of March, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The Ogden Hoffman, district judge.

L. HEYNEMAN *et al.*
v.
SHIP BIRD OF PARADISE AND HER CARGO OF COALS.

And now, at this day, on motion of B. S. Brooks, esq., proctor for the libellants, Hall McAllister, esq., proctor for claimants, being present and consenting thereto, it is ordered by the court that said cargo of coals may be delivered to the said libellants upon their giving a stipulation, payable

in gold coin of the United States, in the sum of seven thousand and fifty dollars.

Endorsed: Filed March 28th, 1864.

W. H. CHEVERS, *Clerk.*

38 *Stipulation for value of coals.*

District court of the United States for the northern district of California, in admiralty.

Stipulation entered into pursuant to the rules of practice of this court.

Whereas a libel was filed on the nineteenth day of January, in the year of our Lord one thousand eight hundred and sixty-four, by Leonard Heynemann, Herman Heynemann, and Frederick P. Solomons against the cargo of coals laden on board the ship Bird of Paradise, for the reasons and causes in the said libel mentioned. And whereas the said cargo of coals is of the value of seven thousand and fifty dollars in gold coin of the United States of the denomination of twenty dollar gold pieces, and Herman Heynemann and Julius Lowenhelm have and do hereby become stipulators in the sum of seven thousand and fifty dollars in gold coin of the United States of the denomination of twenty dollar gold pieces, and is now in the custody of the marshal under the process of attachment, issued in pursuance of the
39 prayer of said libellants, as appears from said libel and papers now on file in said court; and the parties hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the said libellants or their sureties, execution for the above amount may issue against their goods, chattels, and lands:

Now, therefore, the condition of this stipulation is such that if the stipulators undersigned shall at any time upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to the proctor for the libellants abide by and pay the money awarded by the final decree rendered by the court or the appellate court if any appeal intervene, then this stipulation to be void; otherwise, to remain in full force and virtue.

H. HEYNEMANN.
J. LOWENHELM.

40 Taken and acknowledged this 28th day of March, 1864, before me.
W. H. CHEVERS, *U. S. Commissioner.*

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

Hermann Heynemann and Julius Lowenhelm, parties to the above stipulation, being duly sworn, deposes and says, each for himself, that he is worth the sum of seven thousand and fifty dollars over and above all his just debts and liabilities.

H. HEYNEMANN.
J. LOWENHELM.

Sworn to this 28th day March, 1864, before me.
W. H. CHEVERS, *U. S. Commissioner.*

Endorsed: Filed March 28th, 1864.

41 W. H. CHEVERS, *Clerk.*

Order allowing amendment and addition to answer.

At a stated term of the district court of the United States of America

for the northern district of California, held at the court-room, in the city of San Francisco, on Monday, the fourth day of April, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The Honorable Ogden Hoffman, district judge.

L. HEYNEMANN *et al.*
v.
SHIP BIRD OF PARADISE.

And now, at this day, on motion of Hall McAllister, esq., proctor for claimants, it is ordered by the court that he have leave to file amendment and addition to the answer heretofore filed herein.

Endorsed: Filed April 4th, 1864.

42 W. H. CHEVERS, *Clerk.*

Amendment and addition to answer.

In the district court of the United States for the northern district of California.

LEONARD HEYNEMANN, HERMANN HEYNEMANN, AND FREDERICK P. SOLOMONS, libellants,
vs.
THE SHIP BIRD OF PARADISE, HER TACKLE, APPAREL, AND CARGO.

Additional article to answer to be inserted at the end of the seventh article.

Eighth. And these claimants avere that they are in possession of said cargo of coal, and hold, under the facts and circumstances herein alleged, a lien thereon for the freight thereof from said Liverpool to said San Francisco, and that the amount of such freight is the sum of seven thousand and fifty dollars in United States gold coin, and that the whole thereof is now due and unpaid, and that libellants refuse to receive such cargo of coal and pay the freight thereof, but insist that they are entitled to the possession of the same without payment of the freight thereof.

43 Wherefore these claimants pray that this honorable court would be pleased to pronounce against the libel aforesaid and to condemn the libellants in costs, and to decree that claimants have a good and valid lien upon said cargo of coal for the sum of seven thousand and fifty dollars, and otherwise law and justice to administer in the premises.

H. & C. MCALLISTER, *Proctors for Claimants.*

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

Richard Davidson, of aforesaid district, being sworn, says that he is the master of said vessel, the Bird of Paradise, and the agent of the claimants herein for the defence of this action; that said claimants reside in Liverpool, England, and are not now within the State of California; that the above additional article to the answer herein is true, according to the best of deponent's knowledge and belief.

RICHARD DAVIDSON.

44 Subscribed and sworn to before me this 4th day of April, 1864.

W. H. CHEVERS, *U. S. Com'r.*

Endorsed: Filed April 4th, 1864.

W. H. CHEVERS, *Clerk.*

Agreement on which case is submitted.

United States district court in and for the northern district of California.

LEONARD HEYNEMANN *et al.*
vs.
SHIP BIRD OF PARADISE.

The libellants, to maintain the issue on their part, read in evidence a bill of lading and charter-party, which are in the words and figures following:

Shipped, in good order and condition, by Anthony Eccles, in and upon the good ship or vessel called the Bird of Paradise, whereof is master for this present voyage, and now lying in the port of Liverpool and
45 bound for San Francisco, nine hundred and fifty-two tons of best steam coals, being marked and numbered as per margin, and are to be delivered in the like good order and condition at the afore-
952 tons of coals. said port of San Francisco, (all and every the damages and accidents of the seas and navigation of whatsoever nature or kind excepted,) unto order or to assigns, he or they paying freight for the said goods at the rate of , as per charter-party.

In witness whereof the master of the said ship or vessel had affirmed to 3 bills of lading, all of this tenor and date, one of which being accomplished the rest to stand void.

Dated in Liverpool this 4 day of April, 1863.

Weight and quality unknown.

R. DAVIDSON.

Endorsed: I hereby certify that the within mentioned double-screened Little Delph coal is of the best description for steam wrought from the Lancashire Mines.

ANTHONY ECCLES.
ANTHONY ECCLES.

46 *Charter-party.*

LIVERPOOL, 16*th March*, 1863.

It is this day mutually agreed between Messrs. A. Taylor & Co., owner of the good ship or vessel called the Bird of Paradise, of 678 tons or thereabouts, now in the port of Liverpool, whereof is master, and Anthony Eccles, esq., of Liverpool, merchant, that the said ship being tight, staunch and strong, and every way fitted for the voyage, shall, with all possible dispatch, proceed direct to the Liverpool side and there load in the usual and customary manner, in 14 days, in any dock freighter may name, a full and complete cargo of coals or fuel at charterer's option, which said freighter binds himself to ship, not exceeding what she can reasonably stow or carry over and above her tackle, apparel, provisions, and furniture, and charterer to name stevedore, ship paying 9*d.* per ton, and being so loaded shall
47 therewith proceed to San Francisco, or as near thereto as she may safely get, and deliver the same alongside any craft, steamer, floating depot, or pier where she can lie afloat. Notice to be given to the agents of the vessel being ready to discharge, (the act of God, the queen's enemies, fire, strike of pitmen, frost, and all and every other dangers and accidents of the seas, rivers, and navigation during the said voyage always mutually excepted.) The freight to be paid in Liverpool on unloading and right delivery of the cargo at and after the rate of fifty-three shillings and six pence st'g per ton of 20 cwt. on the quantity delivered, in full of all port charges, pilotages, dock wharfage, harbour dues, and Dover and Ramsgate dues, as customary, and such freight is to be paid, say, one fourth in cash

and one fourth by charterer's acceptance at six months from the final
48 sailing of the vessel from her last port in the United Kingdom, the freighter to insure the amount and deduct the cost of so doing from the first payment of the freight, and the remainder by like bill at three months from date of delivery at charterer's office, in Liverpool, of the certificate of the right delivery of the cargo agreeably to bills of lading, or in cash under discount at 5 per cent. per annum, at freighter's option; the cargo to be discharged at the rate of not less than forty-five tons a working day, or to pay demurrage at the rate of four pence per ton register O. M. per diem. The vessel to be addressed to the freighter's agent abroad free of commission, paying five per cent. to charterer in Liverpool. A commission of five per cent. on their contract is due to Sougey, Cooper & Co., ship lost or not lost. If the cargo be fuel, it is to be discharged by hand or in baskets to prevent unnecessary breakage, £500 to be advanced in cash at
49 port of discharge on account of this freight, upon customary terms against captain's draft on charterer at 90 days sight. The ship and her freight are bound to this venture. The penalty for non-performance of this agreement is to be the chartered freight in pounds sterling.

(S'g'd) A. TAYLOR & CO.
(S'g'd) A. ECCLES.

Witness to the signature of A. Taylor & Co.:
(S'g'd) W. A. COOPER.
Witness to the signature of A. Eccles:
(S'g'd) T. E. EDWARDS.

In margin: A true copy of the original charter-party in our possession.
LONGEY, COOPER & CO.

The captain to apply to ` for cargo. The one-fourth advance that is paid in cash is subject to 3 months interest at 5 per cent. per annum as well as cost of insurance.

50 It was admitted that said bill of lading was executed by the master of the ship Bird of Paradise and said charter by the claimants and Anthony Eccles.

It was further admitted that the endorsements on said bill of lading were made by Anthony Eccles, and thereupon said endorsements were read in evidence.

It was further admitted that said Bird of Paradise arrived at San Francisco on the 26th December, A. D. 1863, and that after the arrival of said vessel, and before the commencement of this action, libellants duly demanded of the master of said vessel the cargo covered by said bill of lading, which said master refused to deliver, unless the freight was paid cotemporaneously with said delivery, and that libellants claimed they were entitled to the delivery of said cargo without paying any freight thereon, except in the manner provided in the charter-party.

51 The claimants, to maintain the issue on their part, proved that they, Taylor & Co., were at the time of the making of the charter-party set forth in the libel, and ever since have been, and now are, the sole owners of the ship Bird of Paradise.

That after the making of the charter-party set forth in the libel, and previous to the arrival of said Bird of Paradise at San Francisco, said Anthony Eccles, the charterer, failed in business, and became, and ever since has been, and still is, insolvent and a bankrupt.

That the Bird of Paradise sailed on the voyage in question from her last port in the United Kingdom on the 16 April, 1863.

That the acceptance of said Anthony Eccles for one fourth of the freight

stipulated for by said charter-party was executed by said Eccles on the 16th day of April, 1863, and thereupon delivered to claimants, and is in the words and figures following:

52 No. 436. £636 13. LIVERPOOL, *April 16th*, 1863.

Six months after date pay to our order six hundred and thirty-six pounds 13s. in London, value received, freight of Bird of Paradise.

A. TAYLOR & CO.

To ANTHONY ECCLES, Esq., *King Street, Liverpool.*

At Mess. Howard, Kennard & Co., bankers, London.

ANTHONY ECCLES.

Endorsed: Liverpool court of bankruptcy. Exhibited to me this 12th Nov., 1863, in the matter of Anthony Eccles, a bankrupt. J. Nuin pays registrar.

A. TAYLOR & CO.

That said acceptance of Anthony Eccles, since the making thereof
53 has always been held and owned, and still is held and owned by claimants.

That one fourth of the freight of said cargo of coal was paid in cash, that the aforesaid acceptance was given for another fourth, and that the remainder of the freight (less £500 to be advanced in cash at port of discharge) remains unpaid, and is claimed by libellants only to be payable at the time and in the manner provided for by said charter-party.

That at the commencement of this action R. Davidson, the master of said vessel, was in possession of said vessel and cargo, claiming a lien thereon for ¾ of the freight thereof, which (less aforesaid £500) amounts to seven thousand and fifty dollars in United States gold coin, which last sum includes the amount of aforesaid protested acceptance of Anthony Eccles.

H. & C. McALLISTER, *for Claimants.*
BROOKS & WHITNEY, *Pro's for Libellant.*

Endorsed: Filed April 4th, 1864.

W. H. CHEVERS, *Clerk.*

54 *Decree.*

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room of said court, in the city of San Francisco, on the 28th day of April, A. D. 1864.

Present: Hon. Ogden Hoffman, judge.

L. HEYNEMANN & Co.
v.
THE SHIP BIRD OF PARADISE, ETC.

This cause came on to be heard on the pleadings and proof, and was argued by the advocates for the respective parties, and due deliberation thereon having been had, and it appearing to the court that the cargo of the said vessel belonged to the libellants, that they demanded delivery thereof, and that delivery thereof was refused by the master of said vessel under claim of lien for freight; and it appearing to the court that the said claim was unfounded in law; and it further appearing to the court that pend-
55 ing the libel the said cargo has been delivered to the libellants and damages for its detention released. Therefore, now, on motion of Brooks & Whiting, proctors for libellants, it is ordered, adjudged, and de-

creed that the claimants pay to the libellants their costs and disbursements in this suit to be taxed, and that the stipulation given for the return of said property be given up to be cancelled.

OGDEN HOFFMAN, *Dist. Judge.*

Endorsed: Filed April 28th, 1864.

W. H. CHEVERS, *Clerk.*

Notice of appeal.

In the district court of the United States in and for the northern district of California.

L. HEYNEMAN, *et al.*, libellants,
vs.
SHIP BIRD OF PARADISE, &c., AND A. TAYLOR & Co., defendants and claimants.

56 GENTLEMEN: You will please take notice that the defendants and claimants in the above-entitled cause intend to appeal from the final decree of aforesaid court, rendered in said cause on the 28th day of April, A. D. 1864, and from the whole and every part of said decree.

Dated San Francisco, May 3d, 1864.

Yours, &c.,

H. & C. McALLISTER, *Proctors for Cl'm'ts.*

To W. H. CHEVERS, *Clerk of said Court.*

Messrs. BROOKS & WHITNEY, *Proctors for Lib'lts.*

We hereby admit sevice of a copy of within notice of appeal.

Dated San Francisco, May 3d, 1864.

BROOKS & WHITNEY, *Proctors for Libellants.*

Endorsed: Filed May 4th, 1864.

W. H. CHEVERS, *Clerk.*

57 *Clerk's certificate.*

I, William H. Chevers, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing fifty-four pages, numbered from 1 to 54, both inclusive, to be a transcript of the record of the said district court in the cause named at the beginning hereof, made up pursuant to admiralty rule No. 53, December term, 1854, of the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 21st day of May, A. D. 1864, and the 88th year of our independence.

[SEAL.] W. H. CHEVERS, *Clerk.*

Transcript endorsed: Filed May 21st, 1864.

HENRY C. HYDE, *Clerk.*

58 *Certificate of appeal.*

United States district court, northern district of California.

SHIP BIRD OF PARADISE, &c., *et al.*, appellants,
vs.
L. HEYNNEMAN, *et al.*, appellees.

I, W. H. Chevers, clerk of the district court of the United States for the northern district of California, do hereby certify that the appeal from the decree of this court in behalf of the appellants has been duly perfected on the 10th inst.

Witness my hand and the seal of the said court this eleventh day of May, A. D. 1864.

(Signed) W. H. CHEVERS, *Clerk.*

H. & C. McAllister, *Proctors for Claimants and Appellants.*
Brooks & Whitney, *Proctors for Libellants and Appellees.*

Endorsed: Filed May 12th, 1864.

HENRY C. HYDE, *Clerk.*

59 *Stipulation on appeal to circuit c't.*

In the circuit court of the United States in and for the northern district of California.

The Ship Bird of Paradise, her tackle, apparel, and furniture, and A. Taylor & Co., appellants,
vs.
L. Heynemann, Hermann Heynemann, and Frederick P. Solomons, appellees.

Whereas an appeal has been taken from the decree of this court, made on the 28th day of April, A. D. 1864, in a certain cause wherein Leonard Heynemann, Hermann Heynemann, and Frederick P. Solomons, are libellants, against the ship Bird of Paradise, her tackle, apparel, and furniture, and the cargo laden on board thereof, and A. Taylor & Co., claimants, by the said claimants:

Now, therefore, the stipulators undersigned hereby stipulate, in the sum of five hundred dollars, to pay all damages and costs which shall be awarded against the said appellants by the final decree rendered by the appellate court.

60

ALBERT DIBBLEE.
WM. C. HYDE.

Taken and acknowledged this 10th day of May, A. D. 1864, before me.

(Signed) HENRY C. HYDE, *U. S. Commissioner.*

Northern District of California, *ss:*

Albert Dibblee and William C. Hyde, parties to the above stipulation, being severally duly sworn, each for himself deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

ALBERT DIBBLEE.
WM. C. HYDE.

Subscribed and sworn to this 10th day of May, A. D. 1864, before me,

(Signed) HENRY C. HYDE, *U. S. Commissioner.*

Endorsed: Filed May 10, 1864.

W. H. CHEEVERS, *Clerk.*

Endorsed: Filed May 21st, 1864.

HENRY C. HYDE, *Clerk.*

61 *Appeal.*

In the circuit court of the United States for the northern district of California.

THE SHIP BIRD OF PARADISE, HER TACKLE, APPAREL, and furniture, and A. Taylor & Co., appellants and libellants,
vs.
L. HEYNEMANN, HERMAN HEYNEMANN, AND FREDERICK P. Solomons, appellees and libellants.

To the honorable the circuit court of the United States for the northern district of California:

The appeal of the above-named appellants respectfully showeth that on or about the nineteenth day of January, A. D. 1864, the above-named libellants exhibited their libel in the district court of the United States in and for the northern district of California, against the ship Bird of Paradise, her tackle, apparel, and furniture, claiming to be entitled to the possession of the cargo of coals on board of said ship, together with the sum of
62 fifty thousand dollars alleged to be due them from said ship, as damages for the detention from them of said cargo, and praying, among other things, for the reasons set forth in said libel, that the said ship, her tackle, apparel, and furniture might be condemned and sold to pay the demand of said libellants (and costs) in said libel mentioned; that process issued out of said court, having been served on said ship, said appellants, after the filing of a claim in said cause, and after the argument and decision of the exceptions to said libel, and after the filing of amendments to said libel, and on the 21st day of March, A. D. 1864, filed their answer to the said libel in said district court, praying that said court would be pleased to pronounce against the said libel, and to condemn said libellants with costs, as by reference to said libel and said answer may more fully appear; that on the 28th day of March, A. D. 1864, upon motion of proctors for libellants, an order was entered in said cause directing the delivery of said cargo of coals to said libellants upon their given a stipulation, payable in
63 United States gold coin, in the sum of seven thousand and fifty dollars; that thereupon said stipulation was filed and said cargo of coal was delivered to libellants; that in accordance with an order of the court allowing the same, an amendment was filed to claimants' answer in said district court, praying, among other things, that this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn the libellants in costs, and to decree that claimants have a good and valid lien upon said cargo of coals for the sum of seven thousand and fifty dollars, as may more fully appear by reference to said amendments; that the said cause came on to be heard before the Honorable Ogden Hoffman, judge of the said district court, on or about the 5th day of April, A. D. 1864, upon the pleadings and proofs adduced in said cause, and the said judge having advised thereon, on the 28th day of April, A. D. 1864, made a decree or sentence in said cause, whereby it was, among other things, sentenced
64 and decreed that the claimants pay to the libellants their cost and disbursements in said suit to be taxed, and that the stipulation given for the return of said cargo of coals be given up to be cancelled, as by reference to said decree may more fully appear, which said decree is the final decree of said district court in said cause. And said appellants are advised and insist that the said decree is erroneous, inasmuch as said appellants were entitled to a lien upon said cargo of coals for the sum of seven thousand and fifty dollars, as prayed for in their said amended answer.

Wherefore, for these and other reasons, said appellants appeal from the whole of said decree in favor of said L. Heynemann, Hermann Heyne-

mann, and Frederick P. Solomons, libellants, to the next circuit court to be held in the said district, and on the said appeal they intend to have the said cause heard anew in said circuit court, on the pleadings and proofs in said district court, and other and new allegations to be made in said
65 pleadings, and further proofs to be introduced in said circuit court. And they pray that the record and proceedings in said cause may be returned to the said circuit court, and that the said decree may be reversed, or such other decree thereon be made, as to the said circuit court may seem just, and that said appellees may be condemned to pay to said appellants their claim as set forth in their answer herein, together with their costs and damages in the premises.

Dated San Francisco, May 10th, 1864.

H. & C. McALLISTER, *Proctors for Appellants.*

Endorsed: Filed May 10th, 1864.

W. H. CHEVERS, *Clerk.*

Filed May 21st, 1864.

HENRY C. HYDE, *Clerk.*

66 *Order setting cause for June* 22, 1864.

At a regular term of the circuit court of the United States of America in and for the northern district of California, held at the court-house, in the city of San Francisco, on the 13th day of June, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The Honorable Stephen J. Field, associate justice of the U. S. Supreme Court; the Honorable Ogden Hoffman, U. S. district judge.

SHIP BIRD OF PARADISE
v } In admiralty.
L. HEYNNEMAN *et al.*

On motion of Mr. McAllister, cause set for Wednesday, June 22d, '64.

67 *Order submitting cause.*

At a regular term of the circuit court of the United States of America in and for the northern district of California, held at the court-house, in the city of San Francisco, on Wednesday, the 22d day of June, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The Honorable Stephen J. Field, associate justice of the U. S. Supreme Court; the Honorable Ogden Hoffman, U. S. district judge.

SHIP BIRD OF PARADISE, appellants,
vs. } In admiralty.
L. HEYNNEMANN *et al.*, appellees.

And now, at this day, this cause having been regularly set for to-day, comes Mr. Whitney, one of the counsel for appellees, and on his motion and statement of the agreement of counsel, ordered that this cause be submitted upon the papers on file as returned by the clerk of the district court, and the statement of facts therein contained, which is as follows:

68 *Agreement on which case is submitted.*

United States circuit court in and for the northern district of California.

LEONARD HEYNEMANN *et al.*
vs.
SHIP BIRD OF PARADISE.

The libellants, to maintain the issue on their part, read in evidence a

bill of lading and charter-party, which are in the words and figures following:

Shipped, in good order and condition, by Anthony Eccles, in and upon the good ship or vessel called the Bird of Paradise, whereof is master for this present voyage, and now lying in the port of Liverpool, and bound for San Francisco, nine hundred and fifty-two tons of best steam coal, being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port of San Francisco, (all and every the damages and accidents of the seas and navigation of whatsoever nature or kind excepted,) unto order to assigns, he or they paying freight for the said goods at the rate of , as per charter-party.

952 tons of coal.

69 In witness whereof, the master of the said ship or vessel had affirmed to 3 bills of lading, all of this tenor and date, one of which being accomplished the rest to stand void.

Dated in Liverpool, this 4th day of April, 1863.

Weight and quality unknown.

R. DAVIDSON.

Endorsed: I hereby certify that the within mentioned double-screened Little Delph coal is of the best description for steam wrought from the Lancashire Mines.

ANTHONY ECCLES.
ANTHONY ECCLES.

Charter-party.

LIVERPOOL, 16 *March*, 1863.

It is this day mutually agreed between Messrs. A. Taylor & Co., owner of the good ship or vessel called the Bird of Paradise, of 678 tons or thereabouts, now in the port of Liverpool, whereof is master, and Anthony Eccles, esq., of Liverpool, merchant, that the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall with all possi-

70 ble dispatch proceed direct to the Liverpool side, and there load in the usual and customary manner, in 14 days, in any dock freighter may name, a full and complete cargo of coals or fuel at charterer's option, which said freighter binds himself to ship, not exceeding what she can reasonably stow or carry over and above her tackle, apparel, provisions, and furniture, and charterer to name stevedore, ship paying 9*d.* per ton, and being so loaded shall therewith proceed to San Francisco, or as near thereto as she may safely get, and deliver the same alongside any craft, steamer, floating depot, or pier where she can lie afloat, notice to be given to the agents of the vessell being ready to discharge. (The acts of God, the queen's enemies, fire, strike of pitmen, frost, and all and every other dangers and accidents of the seas, rivers, and navigation during the said voyage always mutually excepted.)

The freight to be paid in Liverpool, on unloading and right delivery of the cargo at and after the rate of fifty shillings and six pence st'g per ton of 20 cwt., on the quantity delivered in full of all port charges, pilotages, dock wharfage, harbour dues, and Dover and Ramsgate dues as customary;

71 and such freight is to be paid, say, one fourth in cash, and one fourth fourth by charterer's acceptance at six months from the final sailing of the vessel from her last port in the United Kingdom, the freighter to insure the account and deduct the cost of so doing from the first payment of the freight, and the remainder by like bill at three months from date of delivery, at charterer's office, in Liverpool, of the certificate of the right delivery of the cargo agreeably to bills of lading, or in cash under discount at five per cent.

per annum, at freighter's option; the cargo to be discharged at the rate of not less than forty-five tons a working day, or to pay demurrage at the rate of four pence *pence* per ton register O. M. per diem. The vessel to be addressed to the freighter's agent abroad, free of commission, paying five per cent. to charterer in Liverpool. A commission of 5 per cent. on this contract is due to Longey, Cooper & Co., ship lost or not lost. If the cargo be fuel it is to be discharged by hand or in baskets to prevent unnecessary breakage;

£500 to be advanced in cash at port of discharge on account of this
72 freight, upon customary terms, against captain's draft on charterer at 90 days' sight.

The ship and her freight are bound to this venture. The penalty for non-performance of this agreement is to be the chartered freight in pounds sterling.

(S'g'd) A. TAYLOR & CO.
A. ECCLES.

Witness to the signature of A. Taylor & Co.:
(S'g'd) W. A. COOPER.
Witness to the signature of A. Eccles:
(S'g'd) T. E. EDWARDS.

In margin: A true copy of the original charter-party in our possession.
LONGEY, COOPER & CO.

The captain to apply to for cargo. The one fourth advance that is paid in cash is subject to 3 months' interest, at 5 per cent. per annum, as well as cost of insurance.

73 It was admitted that said bill of lading was executed by the master of the ship Bird of Paradise, and said charter by the claimants and Anthony Eccles.

It was further admitted that the endorsements on said bill of lading were made by Anthony Eccles, and thereupon said endorsements were read in evidence.

It was further admitted that said Bird of Paradise arrived at San Francisco, on the 26th December, A. D. 1863, and that after the arrival of said vessel, and before the commencement of this action, libellants duly demanded of the master of said vessel the cargo covered by said bill of lading, which said master refused to deliver, unless the freight was paid cotemporaneously with said delivery, and that libellants claimed they were entitled to the delivery of said cargo without paying any freight thereon, except in the manner provided in the charter-party.

74 The claimants, to maintain the issue on their part, proved that they, Taylor & Co., at the time of the making of the charter-party set forth in the libel, and ever since have been, and now are, the sole owners of the ship Bird of Paradise; that after the making of the charter-party set forth in the libel, and previous to the arrival of said Bird of Paradise at San Francisco, said Anthony Eccles, the charterer, failed in business, and became, and ever since has been, and still is, insolvent and a bankrupt; that the Bird of Paradise sailed on the voyage in question, from her last port in the United Kingdom, on the 16 April, 1863; that the acceptance of said Anthony Eccles for one fourth of the freight stipulated for by said charter-party was executed by said Eccles on the 16th day of April, 1863, and thereupon delivered to claimants, and is in the words and figures following:

No. 436. £636 13. LIVERPOOL, *April* 16, 1863.

Six months after date pay to our order six hundred and thirty-six pounds 13s., in London, value received, freight S. Bird of Paradise.

A. TAYLOR & CO.

75 To ANTHONY ECCLES, Esq., *King St., Liverpool.*

Endorsed: Liverpool court of bankruptcy, exhibited to me this 12 Nov., 1863, in the mattter of Anthony Eccles, a bankrupt. J. Nuin pays registrar.

A. TAYLOR & CO.

That said acceptance of Anthony Eccles, since the making thereof, has always been held and owned, and still is held and owned, by claimants; that one fourth the freight of said cargo of coal was paid in cash; that the aforesaid acceptance was given for another fourth, and that the remainder of the freight, less £500 to be advanced in cash at port of discharge, remains unpaid, and is claimed by libellants only to be payable at the time and in the manner provided for by said charter-party.

76 That at the commencement of this action R. Davidson, the master of said vessel, was in possession of said vessel and cargo, claiming a lien thereon for $\frac{3}{4}$ of the freight thereof, which (less aforesaid £500) amounts to seven thousand and fifty dollars in United States gold coin, which last sum includes the amount of aforesaid protested acceptance of Anthony Eccles.

H. & C. McALLISTER *for Claimants.*
BROOKS & WHITNEY, *Pro's for Libellants.*

The foregoing is the agreed statement of facts on which the cause was tried and argued in the United States circuit court in and for the northern district of California.

FIELD, J.

77 *Order for decree.*

At a regular term of the circuit court of the United States of America in and for the northern district of California, held at the court-house, in the city of San Francisco, on Wednesday, the 6th day of July, in the year of our Lord one thousand eight hundred and sixty-four.

Present: The Honorable Stephen J. Field, associate justice of the U. S. Supreme Court; the Honorable Ogden Hoffman, U. S. district judge.

SHIP BIRD OF PARADISE, &c., appellants,
vs.
L. HEYNNEMAN, appellee. } In admiralty.

And now, at this day, this cause having heretofore been duly submitted to the court upon the pleadings and proofs therein, on appeal from the U. S. district court for the northern district of California, and due deliberation having been had in the premises, it is ordered that the decree of the district court be, and it is hereby, affirmed, with costs to be taxed, and that a decree be entered herein accordingly.

78 *Decree.*

Circuit court of the United States, northern district of California, June term, 1864, in admiralty.

THE SHIP BIRD OF PARADISE, HER TACKLE, APPAREL, AND furniture, and A. Taylor & Co., appellants and claimants,
vs.
L. HEYNNEMANN, HERMAN HEYNEMANN, AND FREDERICK P. SOLOMONS.

This cause having heretofore been heard on appeal from the decree of the

district court of the United States for the northern district of California upon the pleadings and proofs therein, and the cause having been submitted and due deliberation had in the premises, it is ordered, adjudged, and decreed that the decree of said district court adjudging that claimants pay to libellants their costs and disbursements herein, and that the stipulation given for the return of the cargo of said ship be given up to be cancelled, be, and it is hereby, affirmed, with costs to be taxed.

Decree entered this 13th day of July, A. D. 1864.

GEO. C. GORHAM, *Clerk*,
Per HYDE, *Dep'ty Clerk*.

79 *Appeal to Supreme C't.*

In the Supreme Court of the United States.

THE SHIP BIRD OF PARADISE, HER TACKLE, APPAREL, AND cargo, and Taylor & Co., appellants and claimants,
vs.
LEONARD HEYNEMANN, HERMANN HEYNEMANN, AND F. P. Solomons, appellees and libellants.

To the honorable the Supreme Court of the United States:

The appeal of Taylor & Co., above-named claimants and appellants, respectfully showeth that on the 19th day of January, A. D. 1864, the above-named libellants, Leonard Heynemann, Hermann Heynemann, and F. P. Solomons, filed their libel in the district court of the United States for the
80 northern district of California against the above-named ship Bird of Paradise, her tackle, apparel, and furniture, and cargo, in a cause, civil and maritime, for the possession of the cargo ladened on board of said vessel, and for damages for the detention of the same, and that said ship was arrested upon process issued upon said libel, and was discharged upon claimants filing a claim to said ship and entering into the necessary stipulation for her release; that thereafter and on the 21st day of March, A. D. 1864, claimants filed their answer, and on the 28th day of March an order was entered in this cause that said cargo be released and delivered to libellants upon their filing a stipulation in the sum of seven thousand and fifty dollars, which said stipulation was filed and said cargo placed in the possession of claimants; that such proceedings were had in the said cause that on the 28th day of April, A. D. 1864, a final decree was made and pronounced therein by the said district court, wherein it was in substance adjudged that
81 the said libellants do recover of said claimants their costs to be taxed herein, and that the stipulation for the release of said cargo heretofore given therein be cancelled and delivered to libellants; and that after such final decree your petitioners duly appealed therefrom to the circuit court of the United States in and for the northern district of California, and there tried anew, and such proceedings were had in the said circuit court that afterwards, on the 13th day of July, A. D. 1864, the said circuit court made a final decree in said cause whereby it was decreed that the said decree of the district court be in all things affirmed, with costs, and that the said appellees have execution therefor; which said decree of said circuit court is, as these appellants are advised, erroneous and ought to be reversed.

Wherefore these appellants appeal from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully pray that the said decree of the said circuit court and the libel, an-
82 swer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States with-

out delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed and a decree made dismissing said libel with costs, or such other decree as to the said Supreme Court shall seem just.

Dated San Francisco, July 16th, 1864.

TAYLOR & CO.

83 Filed July 16, 1864.

GEO. C. GORHAM, *Clerk.*

84 *Citation.*

By the Honorable Stephen J. Field, judge of the circuit court of the United States for the northern district of California, in the tenth circuit, to Leonard Heynemann, Herman Heynemann, Frederick P. Solomons:

Whereas Messrs. Taylor & Co., claimants of the ship Bird of Paradise, her tackle, &c., has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the northern district of California, in the tenth circuit, made in favor of you, the said Leonard Heynemann, Herman Heynemann, and Frederick P. Solomons against the said ship Bird of Paradise, her tackle, &c., and have filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday in December next, to do and receive what may appertain to justice to be done in the premises.

85 Given under my hand, at the city and county of San Francisco, in the northern district of California, the 16th day of July, A. D. 1864, and of the independence of the United States the 88th.

FIELD, *J.*

Service upon us this 16th day of July, 1864, at the city and county of San Francisco, of a copy of within citation hereby acknowledged.

San Francisco, July 16th, 1864.

BROOKS & WHITNEY, *Att'ys for Respondents.*

Endorsed: Filed July 19, 1864.

GEO. C. GORHAM, *Clerk.*

86 *Stipulation as to statement on appeal.*

In the United States circuit court in and for the northern district of California.

THE SHIP BIRD OF PARADISE, HER TACKEL, APPAREL, FURniture, and cargo, and A. Taylor & Co., cl'm'ts and appellants,
vs.
L. HEYNEMANN *et al.*

It is hereby stipulated that the agreed statement of facts, and the testimony in the record in the above action in the circuit court, shall constitute the statement on appeal to the Supreme Court.

H. & C. McALLISTER.
BROOKS & WHITNEY, *Att'ys for Respondents.*

Endorsed: Filed July 19, 1864.

GEO. C. GORHAM, *Clerk.*

87 *Notice of appeal.*

In the circuit court of the United States in and for the northern district of California.

THE SHIP BIRD OF PARADISE, HER TACKLE, APPAREL, AND cargo, and A. Taylor & Co., claimants and appellants,

vs.

LEONARD HEYNEMANN, HERMAN HEYNEMANN, AND F. P. Solomons, libellants and respondents.

To Messrs. Brook & Whitney, proctors for respondents, and to the clerk of the said court:

Please take notice that the above-named claimants intend to appeal to the Supreme Court of the United States from the judgment rendered herein on the thirteenth day of July, A. D. 1864.

San Francisco, July 15th, A. D. 1864.

H. & C. McALLISTER, *Proctors for Appl'ts.*

Endorsed: Filed July 19, 1864.

GEO. C. GORHAM, *Clerk.*

88 *Clerk's certificate.*

In the circuit court of the United States in and for the northern district of California, in admiralty.

SHIP BIRD OF PARADISE
vs.
L. HEYNEMANN *et al.*

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

I, George C. Gorham, clerk of the circuit court of the United States in and for the northern district of California, do hereby certify that the foregoing 87 pages contain a full, true, and faithful transcript of the record of the proceedings in the above-entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the court-house, in the city of San Francisco, this 29th of October, A. D. 1864, and of the independence of the United States the eighty-ninth.

GEO. C. GORHAM,
Clerk U. S. Circuit Court, Nor. Dist. California.

Filed January 24, 1865.

Wm. C. Bryant & Co., Printers, 41 Nassau Street, cor. Liberty N. Y.

Supreme Court

OF THE UNITED STATES.

The Ship "Bird of Paradise" her tackle, &c., Taylor & Co., *Claimants and Appellants*,

vs.

Leonard Heyneman and others, *Libellants and Respondents.*

Libellants' Statement and Points.

This is an appeal, in Admiralty, from the Circuit Court for the Northern District of California.

The libel was filed against "The Bird of Paradise," for non-delivery of a cargo of coal shipped at Liverpool, April 4th, 1863, and consigned litobellants at San Francisco. The case was heard upon an agreed state of facts. (*P.* 13, *fol.* 45.)

The ship was chartered by Taylor & Co., the claimants, to Anthony Eccles, March 16th, 1863, (*p.* 13, *fol.* 46) who shipped the coal and received a bill of lading, dated April 4th, 1863, (*p*, 13, *fol.* 45) by which the cargo was deliverable to order or assigns, he or they paying freight "as per charter party." Eccles endorsed the bill of lading, and the libellants were the holders of it on the arrival of the vessel at San Francisco, December 26th, 1863. On their demanding the coal, the master refused to deliver it unless

the freight " was paid cotemporaneously with said delivery," (*p.* 14, *fol.* 50,) claiming a lien upon the cargo for the whole amount of freight still unpaid. The question is whether he had such a lien.

Before the trial, the cargo was delivered to the libellants on their stipulating for freight to the amount of $7,050 in gold (*pp.* 10, 11, *fols.* 37, 39).

In the District Court, a decree was made that the Master's claim of lien for freight was unfounded in law, that the stipulation be cancelled, and that libellants recover their costs (*p.* 15, *fol.* 54).

The case was heard in the Circuit Court upon the same facts (*pp.* 19–22, *fols.* 68–76), and the decree of the District Court was affirmed, July 13, 1864 (*p.* 22, *fol.* 78).

The appeal to this Court is at *page* 23.

I.—The provisions of the charter party are utterly inconsistent with any lien upon the cargo for the freight.

The freight was to be paid at Liverpool, the port of loading, not at San Francisco, the port of discharge. A payment to the master at San Francisco, therefore, would not protect the party making such payment. The freight was to be paid not concurrently with the delivery of the cargo, but partly in advance and partly three months after such delivery: " One-fourth in cash and one-fourth by charterer's acceptance at six months from the final sailing of the vessel" (fol. 48). These payments were to be made in advance of any freight being earned, in consideration therefore not of having carried, but simply of agreeing to carry and of taking the cargo on board. " The remainder, by like bill, at three months from date of delivery, at charterer's office in Liverpool, of the certificate of the right delivery of the cargo" (fol. 48). This portion was, therefore, payable also in Liverpool, and not payable there till a certificate should be produced at the charterer's office in Liverpool that the cargo had been duly delivered in San

Francisco, and then payable by bill at three months, or in cash, at charterer's option.

It is impossible to sustain a lien as for freight, under a special contract of this character, without disregarding the whole current of authority. (*The Kimball*, 3 *Wallace*, 37; *Raymond* v. *Tyson*, 17 *How.*, 53; *Chandler* v. *Belden*, 18 *Johns.*, 157; *The Schooner Volunteer*, 1 *Sumn.*, 551; *Certain Logs of Mahogany*, 2 *Sumn.*, 589; *Ruggles* v. *Bucknor*, 1 *Paine C. C.*, 358; *Pinney* v. *Wells*, 10 *Conn.*, 104; *Alsager* v. *The St. Katherine's Dock Co.*, 14 *M. & W.*, 794; *Foster* v. *Colby*, 3 *H. & N.*, 705; *Kirchner* v. *Venus*, 12 *Moore P. C.*, 361; *Tamvaco* v. *Simpson*, 19 *Com. B., N. S.*, 453, *affirmed*, 1 *Law Rep. C. P.*, 363.)

The lien exists only where the master has a right to demand the freight on unlading the cargo, or where the freight is payable so soon after the cargo is discharged as to imply a right in the master to detain for that short period; as in the case of *The Kimball*, where the freight was payable, "one half in five and one half in ten days after discharge" of the cargo. There a distinction was drawn between a discharge of the cargo and the delivery of it, the period allowed being held "only a reasonable one for examining the condition of the cargo."

In the case at bar, however, the credit given was so long, and the provisions of the charter party in reference to place of payment so inconsistent with any lien, as to make it quite clear that the contract was made upon the personal responsibility of the charterer and the consideration of the cash received in advance.

Conner Law Lien of Master
Desk, 1 Mall, 2 Dessau 485

II.—The case was tried below on the naked question, whether the master had a lien *for the whole amount* of the unpaid freight.

The bill of exchange, which had been given in Liverpool, according to the charter, for one-fourth of the freight was £636 13, and this, of course, was the amount of the

other fourth, which was paid in cash. The bill matured Oct. 10th, 1863, and was dishonored. Eccles had become bankrupt, and the bill had been presented by the claimants in the Bankruptcy Court, on the 12th Nov., 1863, (*p. 15, fol. 52.*) It was not simply for the amount of this bill that the master claimed to hold the cargo.

Nor was there any question as to the £500, payable by the consignees, the libellants on the discharge of the cargo. This was paid and the amount of freight it left unpaid was liquidated as follows:

The one-fourth of the freight represented by the dishonored bill being £636 13, the three-fourths unpaid would be £1,909 : 19s. or say £1,910.

Deduct from this the £500 paid in cash, and there would be left unpaid, £1,410. This sum, reduced to gold dollars, at $5 to the pound sterling, is the sum of $7,050, and accordingly the agreed statement is as follows:

"That one-fourth of the freight of said cargo of coal was paid in cash; that the aforesaid acceptance was given for another fourth, and that the remainder of the freight (less £500, to be advanced in cash at the port of discharge), remained unpaid, and is claimed by the libellants only to be payable at the time and in the manner provided for by said charter party.

"That at the commencement of this action R. Davidson, the master of said vessel, was in possession of said vessel and cargo, claiming a lien thereon for three-forths of the freight thereof, which (less aforesaid £500) amounts to seven thousand and fifty dollars in United States gold coin, which last sum includes the amount of aforesaid protested acceptance of Anthony Eccles." (P. 15, *fol.* 5.)

There was no question therefore about detaining, simply for the amount of the dishonored bill of £636 13, or for the £500, payable at San Francisco.

III.—But the right of lien does not depend upon the solvency of the charterer. In fact the lien is of importance

to the owner only as his remedies against the charterer are precarious. Accordingly, the cases on the subject are cases where the charterer was in default. In *Raymond* v. *Tyson*, there was a large arrear of charter money. In *The Kimball*, the charterers had become insolvent, and though the lien was sustained, it was not on this ground. In *Alsager* v. *The St. Kath. Dock Co.*, the charterers were bankrupt, and the suit for the cargo was brought by their assignees, who were allowed to recover without paying freight. In *Tamvaco* v. *Simpson*, the acceptor for a portion of the freight in advance had become bankrupt.

The question whether there is a lien or not, depending as it does upon the charter containing terms as to payment, showing a credit given to the charterer, inconsistent with a lien, must be determined by the charter itself, not by circumstances subsequently occurring. If in fact the owner has agreed to carry the cargo, without retaining a lien upon it, but looking to the personal responsibility of the charterers whom he has agreed to trust for the freight, the charterer may sell the cargo in transit, as being free from freight, and his subsequent insolvency cannot charge it with a lien.

IV.—The common provision in a charter-party, binding the cargo to the ship and the ship to the cargo (*Abb. on Ship.*, 285–6), is sometimes taken into consideration in determining whether the ship-owner intended to waive his lien for freight. (*The Kimball*, 3 *Wall.*, 37; *The Schooner Volunteer*, 1 *Sumn.*, 551.) In this case, in lieu of such usual clause, the charter only binds the vessel and her freight, and does not bind the cargo. (*P.* 14, *fol.* 49.) This unusual language is quite consistent with the provisions as to the time, manner, and place prescribed for the payment of the freight, which it is impossible to reconcile with any right to detain the cargo.

V.—The exception to the libel (*p.* 7, *fol.* 24), which was overruled (*fol.* 26), is not available in this Court.

It was waived by the trial on an agreed statement of facts (*p.* 13, *fols.* 45 *to* 54), and it was not raised in the Circuit.

But if the exception is open to discussion here, it was properly overruled.

The libellants were in possession of the bill of lading, duly endorsed, and were, accordingly, presumptively owners of the cargo. The particular consideration of their title, whether as purchasers for value, pledgees, or otherwise, was of no importance. There was no question as to their right to the cargo on paying freight, and the dispute was simply as to their right to it *without* paying freight. This was the only question tried, and the only one really open for trial.

VI.—The decree made by the Court below was clearly right and should be affirmed.

E. H. Owen,
S. P. Nash,
Of Counsel for
Libellants and Respondents.

Supreme Court,

OF THE UNITED STATES.

THE SHIP BIRD OF PARADISE, HER TACKLE, &C., AND CARGO, TAYLOR & CO., CLAIMANTS.
Appellants,

vs.

LEONARD HEYNEMAN, HERMAN HEYNEMAN AND FREDERICK P. SOLOMON, LIBELLANTS,
Appellants.

Abstract and Brief for Appellants.

H. & C. MCALLISTER,
Proctors for Appellants.

E. C. BENEDICT,
Advocate for Appellants.

This is an appeal from the Circuit Court for the Northern District of California, in Admiralty.

The libellants filed their libel in the District Court for the Northern District of California, January 19th, 1864. Record, (fol. 1 to 11.) *First*, against the ship Bird of Paradise, to recover $50,000 damages for violation of charter party, in not consigning the vessel to the libellants, nor delivering to them the cargo, but retaining it, claiming a lien for the freight when no such lien ever existed; and *Second*, against her cargo of coal, to recover "possession of it as having good title thereto," with monition to all persons claiming interest therein.

Process was issued against both vessel and cargo, and both were attached.

The libel was excepted to, (folio 23.)

The first exception was overruled and the second allowed, (fol. 26,) and the libel was amended accordingly (fol. 27).

A. Taylor & Co., the claimants filed their claim for the vessel and cargo, February 2d, 1864, and put in their answer March 21, 1864 (fols. 28, 36), claiming the right to retain the coal for the payment of the freight (fol. 42), and denying the wrongful detention and the damages (fol. 33), and averring that Eccles, the charterer, had failed to perform the charter; had failed to pay the freight which was due before her arrival, and was insolvent, bankrupt and absconded, and that his original agreement for credit was fraudulent (fols. 34, 35).

The libellant bonded the cargo (fol. 38) for $7,050, in gold, the amount of freight unpaid.

The answer was amended April 4th (fol. 42).

The facts in the case were agreed upon in writing (fols. 44 to 53).

The District Court made a decree for the libellants that the cargo *belonged* to the libellants, and that there was no lien for freight, April 28th, 1864 (fol. 54).

The claimants appealed to the Circuit Court May 10th, 1864 (fol. 61).

The cause was submitted to the Circuit Court without argument, June 22d, 1864 (fol. 67).

The decree of the District Court was affirmed July 6th, 1864 (fol. 78).

The claimants appealed to this Court July 16th, 1864, (fol. 79.)

Statement.

On the 16th March, 1863, Anthony Eccles, of Liverpool, chartered from the claimants the ship the Bird of Paradise, of which they were owners, to carry a full cargo of coal to San Francisco, at the rate of fifty-three shillings and six

pence sterling per ton on the quantity delivered, payable on unloading and right delivery of the cargo. The freight to be paid in Liverpool, one-quarter in cash, one-quarter by the acceptance of Eccles, the charterer, at six months from the final sailing of the vessel, and the remainder by like bill at three months from delivery at charterer's office in Liverpool of certificate of right delivery of cargo agreeably to bill of lading, or in cash, less five per cent., at freighter's option. The ship and her cargo were bound for the performance of the charter. The penalty for non-performance was the chartered freight in pounds sterling.

On the 4th day of April, 1863, the master signed, and the freighter Eccles accepted, a Bill of Lading, in the usual form, for the cargo deliverable to order or assigns, he or they paying freight at the rate fixed by the charter party, (fol. 2.)

The cargo belonged to Eccles, fol. 2 and fol. 11, and the charter party provided that the vessel should be consigned to his agents in San Francisco, (fol. 9.) The Libellants were the agents of Eccles at San Francisco, (fol. 4.)

The vessel sailed from Liverpool April 16th, 1863, and arrived at San Francisco December 26th, 1863—8 months, 10 days.

The charterer, Eccles, paid one-quarter of the freight before sailing, and gave his acceptance for another fourth at six months, falling due October 19th, 1863, more than two months before the vessel arrived, but it was never paid, Eccles having failed in business, and becoming and remaining insolvent and a bankrupt. The other acceptance for the residue of the freight was not given, and the freight was not paid, nor offered to be paid, at San Francisco. The captain, therefore, refused to consign the ship and cargo to the Libellants, the agents of Eccles, but kept control of the ship and cargo, (fol. 4.)

The Libellants, the agents of the insolvent charterer, demanded the cargo of the master without payment of freight, and the master refused to deliver it unless the freight, which amounted to $7,050 in gold, was paid on delivery, according to the Bill of Lading. The charterer's agents insisted that no freight was payable except by their bankrupt principal in Liverpool, in his own worthless paper, as provided in the charter party.

The freighter never exercised or communicated the option reserved in the charter party. He never gave nor offered his acceptances, except one before sailing, nor offered to pay nor refused to pay cash.

Points.

1.—This is a most unconscionable action. In such an action, the Court will make all reasonable presumptions against the Libellants.

The libellants' principal, Eccles, chartered the vessel to carry a cargo of coal from Liverpool to San Francisco, a voyage of more than eight months. The vessel performed the voyage in safety at the expense of the owners, and then finding the charterer an absconding bankrupt, refused to deliver the cargo to his agents unless the freight was paid. The agents refused to pay the freight, and they brought this extraordinary action, joining one of damage against the ship for $50,000 and one of possession against the cargo, placing the master and his ship in a remote foreign port, almost in a condition of duress. Having had the use of the entire ship, without expense, for more than nine months, this bankrupt charterer demands the cargo free of freight,

on the sole ground that he had given a written promise to pay the freight which he had failed to perform and never would perform.

The unpaid freight at the end of the voyage has become incorporated with the cargo and is a part of its value, and *pro tanto* the cargo belongs to the owner in justice and conscience, and the master having possession of it, ought not to be compelled to relinquish possession without payment.

A Court of Admiralty is a court of equity to the extent of doing justice and requiring justice, and it will, in a cause of possession, compel the libellants to do equity before it will transfer to him the possession. Freight is a most just demand. 1 Hag. 357; 1 W. Rob. 35; ibid. 192 Coote 8; Bened. Ad. §329.

Charter parties are to be liberally construed. 17 How. 59–60, Raymond *vs.* Tyson.

II.—These two causes of action cannot be joined, they are incompatible, requiring different judgments, and for this the decree must be reversed.

If the libel had stated the causes of action, as it should have done, thus, "Against the ship in a cause of damage, and against 952 tons of coal in a cause of possession," the misjoinder would have been very apparent and striking.

III.—The case, as presented in the evidence, is an entire departure from the case articled upon in the libel, and

for this reason the libellants were not entitled to recover.

The libel, after alleging the making of the charter party and bill of lading, alleges an assignment of them for value by Eccles with all his rights under them and in the cargo to Leach, Harrison & Forward, of Liverpool, and an assignment by Leach, Harrison & Forward to the libellants, and an appointment by them of the libellants as charterer's agents to receive the cargo, (fol. 2, 3, 4,) and this state of facts is the only foundation of this action. They put their right on no other ground—showing a right of action in the libellants.

Tho proofs ignore this statement entirely. There is not a word of all this in the proofs, (fol. 68 to 76.) After the making of the charter party by Taylor & Co. and Eccles and the making of the bills of lading by the master to Eccles there is no more evidence on the part of the libellants, (fol. 68 to 73,) thus showing a cause of action in Eccles alone and no right in the libellants.

The claimants' defence is to this cause of action—

The libellant is bound to prove his case as he alleges it. He cannot recover on the theory that his libel is false. Having alleged that he is the assignee of a third party, who is also an assignee for value, of the charter party, he cannot recover without proving his title to the charter party as he alleges it, but he has given no such proof. 1 Sumner 331 the Boston; 21 Howard, 346 McKinley *vs.* Morrish.

IV.—As to the action of possession—the libellants were not entitled to recover unless they made out *strictissimi*

juris a right to the possession of the cargo free of freight, as against Captain Davidson, the master of the vessel, who was in possession under the bill of lading.

This they failed to do. They had no possessory right under the charter party. They were not parties to it, and it was never assigned to them. Their right was under the bill of lading alone, and by the bill of lading the cargo was to be delivered to Eccles, or his assigns, he or they *paying* freight at the rate fixed by the charter party.

V.—There is no such action as possession for cargo carried under a charter party, or a bill of lading. The action must be *in rem* against the ship or *in personam* against the master or owners for the violation of the contract of affreightment.

Rule 20 contains the whole practice as to possessory and petitory suits, and relates only to ships not to cargo.

VI.—The freight is a lien upon the cargo by the maritime law, and all presumptions are in favor of the lien.

The ship is bound to the merchandise and the merchandise to the ship. This lien is not created by the act of the parties but by the general maritime law, and is founded in public policy and the interest of commerce, (3 Wal. 42, The Kimball.) It gives to the owner and the shipper a responsible indorser and a responsible defendant in every port of the sea. And this elementary and cardinal rule is always to prevail

unless the parties have expressly and intentionally excluded it. It is not enough that possibly they intended to exclude it; it must be clear that they intentionally excluded it. It is not enough that some of the provisions of the contract seem inconsistent with a lien. It must be clear, from the whole contract and conduct of the parties and the circumstances of the case taken together, that both parties intended that in no event there should be a lien—so clearly and positively that if the shipper should become a bankrupt and abscond and violate every part of his contract, before the ship should sail, the owner would be bound to send his ship half round the world without the hope or possibility of receiving a dollar freight.

"If it be only doubtful whether the owner has waived his lien upon the cargo, he must have the benefit of that doubt." (17 How. Raymond *vs.* Tyson, *vid.* also pp. 70 and 71, dissenting opinion of Judges Campbell and Grier.) 64

"The lien being both legal and equitable, the Courts are naturally disposed to favor it, and not to impair or diminish its exercise. The owner's right of lien is so far favored in law that while he keeps possession by his master and crew, it can only be excluded by the most express and absolute terms, or by a necessary implication from the contract." (p. 70, quoting Holt.)

"The commercial law does not exact a stipulation to support the lien of the ship owner, but requires circumstances expressive of a 'determinate abandonment' as the condition of its removal." (p. 71.)

Nothing can be inferred from silence. The burden is on the shipper to prove an absolute waiver of the lien. He has given no such evidence.

VII.—In this case, there is no such clear evidence that the

owners intended that, in all contingencies and at all hazards the, cargo was not to be liable for the freight. On the other hand, there was a fundamental condition that the acceptances should be good. This condition the law adds to the contract. There were also circumstances which always aid in the construction of such contracts.

The agreement to give an acceptance means an acceptance of a solvent man—an acceptance which has value—not an acceptance of an absconding bankrupt. They gave only worthless paper which was not payment.

The charterer having failed to perform the charter party on his part, not having paid his acceptance and being insolvent, the charter money became due in pounds sterling (cash), and the cargo was bound for it. "The penalty for non-performance of this agreement is to be the chartered freight in pounds sterling." (The charter party, fol. 49.) That is to say, in cash on delivery.

The giving an acceptance was not performance if it were not paid. It fell due before the end of the voyage, and not being paid at maturity, Eccles failed to perform his part of the contract, and his bankruptcy demonstrated that he would never perform it.

The owner was, thereupon, by the contract, as well as by the maratime law, entitled to hold the cargo till the freight was paid. He had the lien by possession as well as the maritime lien which affects the *thing* irrespective of the possession. He had relinquished neither. The bill of lading, made after the charter party, was the contract of shipment and delivery, and it was the final contract. The charter party was an agreement between the parties as to what they would do. The bill of lading was the statement of how they

had done it. It declares in substance, "We have received your cargo, and it will be delivered to you if you *pay* as agreed in the charter party. If you do not 'pay' it will not be delivered. We shall not deliver on dishonored acceptances—they are not payment." If these words had been in the bill of lading there could have been no doubt—yet such is the legal construction.

The cases of sales of merchandise present strong analogies—sales of goods conditionally, as for cash or endorsed paper, and the cash not paid or the notes not given and the property delivered—the delivery is conditional, if the intent of either party that it should be so can be inferred from their acts and the circumstances of the case.

16 New-York Rep. (2d Smith) 598.

"The agreement (to take notes for goods) was executory in respect to title. It certainly was in respect to the delivery, and before the time for the performance arrived, the essential consideration on which it was based had failed. It is true that the sale, looking only at the precise letter of the contract, was not defeasible in the event which occurred. But when the parties contracted, the firm of Legget Brothers was in good credit, and was supposed to be solvent. Their notes were to be accepted as payment, but the ability of that firm to give good notes was assumed and was really the consideration of the defendants' agreement."

"The analogies to be derived from the law of stoppage *in transitu* are perhaps not perfect, but they are sufficiently near to furnish a rule for the present case. When goods are sold to be paid for in the notes of the buyer, and he becomes insolvent before the delivery is complete, the seller may arrest the delivery and rescind the sale. Such is the right of the seller, although in

such cases the title to the goods has passed by the sale and they are placed at the buyers' risk, by being put in transit. But this is a right which violates the mere forms of the sale. There is nowhere in the terms of the contract any such condition. The law implies it, because the assumed ability of the buyer to pay for the goods was the inducement to the sale."—Court, by Comstock, J.

This applies with greater force to the case of acceptances given for freight, in a case like this.

The Circumstances: This was the longest voyage known to commerce, ending many thousands of miles from the parties; no security except the cargo. The cargo homogeneous, of great value and ready sale; the taking the bill of lading in addition to the charter parter; the making the acceptances fall due before the end of the voyage, so that if not paid, the charterer would violate the charter party and the master be entitled to enforce his lien for the whole freight by the bill of lading, and the improbability that any shipowner would dispatch his ship on such a voyage with no possible security for any freight; all these coincide with those provisions of the contracts which provide for the usual lien.

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Advocate for Appellant.